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Comments

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COMMENTS

BANKRUPTCY—THE "STRONG-ARM CLAUSE" OF SECTION 70(c)—EFFECT UPON BELATED FILING OF A CHATTEL MORTGAGE.

It is apparent that the courts have influenced debtor-creditor relationships by judicial interpretation and construction of the federal bankruptcy laws. Foremost in the controversy has been the "strong-arm clause" of section 70(c) of the Bankruptcy Act[1] which fortifies the trustee with the powers of "the ideal creditor, irreproachable and without notice, armed cap-a-pie with every right and power which is conferred by the law of the state upon the most favored creditor who has acquired a lien by legal or equitable proceedings."[2] This clause must be read concurrently with section 70(e) of the Bankruptcy Act, which places the trustee in the shoes of an actual existing creditor with the powers bestowed upon such a creditor by federal or state law and which permits the trustee to void any transfer that the creditor having a claim provable under the act could avoid.[3] The question has arisen whether the trustee, as an ideal hypothetical creditor under section 70(c) has a lien superior to that of a mortgagee who has not filed his chattel mortgage under state law within a reasonable or fixed time after its execution but who did file it more than four months before bankruptcy, even though there was no creditor in existence who under state law had extended credit to the bankrupt between the date of execution of the chattel mortgage and the date of its filing and thus could have contested the validity of the chattel mortgagee's lien. Before this question is discussed, it would be wise to review the history of the trustee's powers under section 70(c) and notice the evolution and expansion of powers thereunder. This Comment will then investigate the theory of recent cases defining and interpreting the trustee's powers under section 70(c) of the Bankruptcy Act and critically evaluate their result.

1. 64 Stat. 23 (1950), as amended, 11 U.S.C. § 110(c) (1952). It provides, "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

2. *In re* Waynesboro Motor Co., 60 F.2d 668, 669 (S.D. Miss. 1932) (Holmes, J.).

3. 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(e) (1952), which provides: "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor."

I.

HISTORY OF THE "STRONG-ARM CLAUSE."

The Supreme Court in 1906, in the case of *York Manufacturing Co. v. Cassell*,[4] refused to give the trustee in bankruptcy a lien on property at the time of bankruptcy where a conditional sale agreement had been executed but not recorded as required under the applicable Ohio law so as to make the contract enforceable against lien creditors of the purchaser who levied prior to recording. There were no lien creditors in existence who could avoid the sale under state law, and therefore it was held that under the provisions of the Bankruptcy Act the trustee was vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the petition was filed.[5] Since the conditional sales contract was good as between the conditional vendor and the bankrupt, it was good against the trustee also as he took the bankrupt's title subject to the same conditions and equities under which the bankrupt had previously held it.

Congress' answer to the *York* case was the enactment in 1910 of an amendment to section 47(a) (2) of the Bankruptcy Act.[6] The purposes of this amendment were to give the trustee in bankruptcy the same title as an execution or lien creditor would have under state law as to property in the bankruptcy court's custody and further, to enable the trustee to stand in the position of a judgment creditor having an unsatisfied execution on property not in the custody of the bankruptcy court. Thus, it attempted to wipe away the advantage previously given to holders of unrecorded, secret liens.[7]

In a case interpreting section 47(a) (2), *Bailey v. Baker Ice Machine Co.*,[8] a fact situation was presented to the Court similar, though not iden-

4. 201 U.S. 344 (1906).

5. The Court did not refer to any particular provision of the act, and apparently was referring to the general rule as to defenses available against the trustee. See Commercial Credit Co. v. Davidson, 112 F.2d 54 (5th Cir. 1940), which states the general rule that a trustee is not an innocent purchaser but takes the property subject to all valid liens, claims and equities existing against it in the bankrupt's hands at the time of the filing of the petition.

6. 36 Stat. 840 (1910), which provided, ". . . and such trustees, as to all property in custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by equitable or legal proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

7. 45 CONG. REC. 2277, H.R., 61st Cong., 2d Sess. 23 (1910). Previously, however, the Supreme Court had indicated that the *York* decision was more restricted than Congress in enacting this provision presumed to be the case. See Security Warehousing Co. v. Hand, 206 U.S. 415 (1907) where the Court pointed out that although there were no lien creditors in existence, where state law affords protection to general creditors, and not merely lien creditors, then the trustee may act in behalf of the general creditors as to voidable transfers.

8. 239 U.S. 268 (1915). Unlike the *Constance* case, state law in the *Bailey* case protected only lien creditors.

tical, to the recent case of *Constance v. Harvey*[9] and the trustee also made similar arguments. A vendor had sold an ice machine under a conditional sale agreement which was not recorded until three months after its execution. Within two months of the recording, bankruptcy ensued and the vendor attempted to recover the machine. Under state law, the conditional sale agreement was valid between the parties but void as to a lien creditor of the vendee who became such before the recording of the contract. It was trustee's contention that, even though there was not in fact a lien creditor in existence between the execution of the agreement and its recording, section 47(a) (2) extended the status of lien creditor to the trustee for the period when a lien creditor could have attacked the unrecorded conditional sale agreement under the state law had there been such a creditor. Significantly, the Court repudiated this argument and agreed that the trustee had the status of a lien creditor but only at the date of the bankruptcy and that the trustee could not relate such a status back to any period prior to bankruptcy. Similarly, the Supreme Court in *Martin v. Commercial Nat. Bank*[10] held that a chattel mortgage, which had been recorded six months after its execution and the day before bankruptcy, was not voidable by the trustee either under the powers bestowed upon him by section 70(c) or as a preference under 60(a), (b),[11] as Georgia law required registration only in favor of a creditor who fixed a lien on the property before the recording took place, and the trustee acquired his lien after the recording. Under the *Bailey* and *Martin* cases then, the trustee under section 70(c) is given the status of a hypothetical lien creditor only at the date of bankruptcy with the trustee's rights and powers being determined under the applicable state law.

The "strong-arm clause" has been subsequently amended and in 1938, section 47(a) (2) was incorporated in section 70(c) of the Chandler Act.[12] In Congress' own words, the purpose of the Chandler Amendment was not to change the substance of the statute but to clarify its purpose and provisions.[13] In 1950, and again in 1952, the "strong-arm clause" of sec-

9. 215 F.2d 571 (2d Cir. 1954), *cert. denied*, 348 U.S. 913 (1955). For a discussion of the *Constance* case see text beginning at note 29, *infra*.

10. 245 U.S. 513 (1918).

11. 36 Stat. 842 (1910), 11 U.S.C. 96(a), (b) (1952). Under this section a hypothetical creditor test as to personalty is carried back four months. Formerly, under the Chandler Act the test was that of a bona fide purchaser. If the secured interest is perfected within the four month period preceding bankruptcy, and the debtor at that time is insolvent and the secured party had reasonable cause to believe this to be so, then the trustee may void the preference as to the secured party.

12. 52 Stat. 881 (1938), as amended, 11 U.S.C. § 110(c) (1952), which provided, ". . . the trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists."

13. H.R., 74th Cong., 2d Sess. 1356 (1936).

tion 70(c) was amended to read as it now stands.[14] The strong-arm clause now bestows the rights of a lien creditor upon the trustee as to all property in which the bankrupt has an interest. The cumbersome language distinguishing property in the bankrupt's possession at the time of bankruptcy, that coming into the court's possession and all other property, was eliminated in favor of a more simplified construction.[15]

II.

SECOND CIRCUIT DECISIONS.

Application of State Law Under Bankruptcy Act.

In order to determine the trustee's rights and powers under section 70(c), state law must first be ascertained and appropriately, the court may have to determine if there has been a security transaction and if so what type it is.[16] Thus, whether a security transfer has been perfected[17] or, if it has been perfected, whether a lien creditor at the date of bankruptcy has priority over the trustee,[18] may depend on state law and/or an interpretation of the security agreement. State law may determine that an unrecorded security transfer is voidable as to simple contract creditors[19] or, on the other hand, only as to creditors who have obtained a lien as of the date of bankruptcy.[20] The effect of a belated recording is likewise dependent upon the applicable state law.[21]

Under New York law, an unrecorded chattel mortgage is valid between the parties themselves but in the words of the statute, ". . . is absolutely void as against creditors of the mortgagor, and as against subse-

14. 64 Stat. 23 (1950), as amended, 11 U.S.C. § 110(c) (1952).

15. See note 12, *supra.*

16. See, *e.g.,* Caldwell Finance Co. v. McAllister, 226 F.2d 189 (9th Cir. 1955); Finance & Guaranty Co. of Baltimore v. Still, 21 F.2d 718 (3d Cir. 1927), *cert. denied,* 276 U.S. 619 (1928).

17. See, *e.g.,* In the Matter of Luckenbill, 156 F. Supp. 129 (E.D. Pa. 1957).

18. See, *e.g.,* Constance v. Harvey, 215 F.2d 571 (2d Cir. 1954), *cert. denied,* 348 U.S. 913 (1955); *In Re* Consorto Constr. Co., 212 F.2d 676 (3d Cir.), *cert. denied,* 346 U.S. 833 (1954).

19. See, *e.g.,* Matter of American Cork Industries, Inc., 54 F. 2d 740 (2d Cir. 1931).

20. See, *e.g.,* City Nat. Bank & Trust Co. v. Oliver, 230 F.2d 653 (N.D. Ohio 1955).

21. a) The belated recording may validate the transaction against all creditors not having antecedent liens. *In Re* Consorto Constr. Co., 212 F.2d 676 (3d Cir.), *cert. denied,* 340 U.S. 833 (1954).

b) The belated recording may validate the transaction except as to those who extended credit relying on the non-filing of a security agreement. *In Re* Di Pierro, 159 F. Supp. 497 (D. Me. 1958).

c) The belated recording may validate the transaction except as to those extending credit between the execution and the recording of the agreement. Matter of Faber, 41 F.2d 726 (9th Cir. 1930).

d) The belated recording may validate the transaction only as to creditors becoming such after the recording. Karst v. Gane, 136 N.Y. 99, 32 N.E. 1073 (App. Div. 1893).

e) The belated recording may fail to validate the transaction as to any creditor. *In Re* Pacific Electric & Auto Co., 224 Fed. 220 (W.D. Wash. 1915).

quent purchasers and mortgagees in good faith and for a fair consideration, unless the mortgage or a true copy thereof, is filed as directed in this article."[22] This has been construed by the Court of Appeals of New York[23] to void the mortgage as to general creditors in existence at the time of the execution of the mortgage when the mortgage is filed after an unreasonable delay. However, a chattel mortgage filed after an unreasonable delay is valid as to subsequent creditors of the mortgagor but is voidable as to all creditors who become such between the date of execution and the filing of the mortgage.[24]

Constance v. Harvey Rationale.

In a 1952 bankruptcy case, *Zamore v. Goldblatt*,[25] concerning a belatedly filed chattel mortgage, the mortgagee had attempted to replevy certain articles in the bankrupt's possession at the time of bankruptcy. There was one general creditor in existence at bankruptcy who had extended credit to the bankrupt between the date of the excution of the chattel mortgage and the date of the belated filing. The trustee was permitted to sell the articles free and clear of the chattel mortgage which was held void as to the trustee because of the belated filing. The court said:

> "It is argued by the appellants that the trustee could not attack the mortgage because he represented only one small creditor whose claim arose before the date of filing but one creditor who could attack it was enough to avoid the mortgage under section 70, sub. c of the Bankruptcy Act . . . against later creditors represented by the trustee."[26]

It appears that the trustee could have voided the mortgage transaction by reason of the powers granted to him under section 70(e) where he is subrogated to the rights of an existing creditor who could under state law attack the transaction. The court relied upon the case of *Moore v. Bay*[27] where the Supreme Court held a recorded mortgage invalid as to all creditors since the recording was not in accordance with state law requirements. In the *Moore* case there were creditors who had extended credit between the dates of the execution and the attempted recording of the mortgage and also creditors who gave the bankrupt credit at a later date. The mortgage was voided as to all under section 70 without specifying the applicable subparagraph. Although the most significant feature of this case was the fact that the Court held that once the security interest is voided as to one creditor the trustee takes for the benefit of all creditors,

22. N. Y. UNCONSOL. LAWS § 230 (McKinney 1959).
23. Karst v. Gane, 136 N.Y. 316, 32 N.E. 1073 (App. Div. 1893).
24. Petition of Plans, 282 App. Div. 552, 125 N.Y.S.2d 750 (1953); Skilton v. Codington, 185 N.Y. 80, 77 N.E. 790 (App. Div. 1906).
25. 194 F.2d 933 (2d Cir. 1952).
26. *Id.* at 934.
27. 284 U.S. 4 (1931).

the mortgage could have been voided under either section 70(c) or 70(e). However, the court in *Zamore* cited section 70(c) which places the trustee in the position of an ideal hypothetical creditor whose lien arises at the date of bankruptcy. But two later decisions of the circuit,[28] in citing the *Zamore* case, indicated that the court there had relied on section 70(e). It appeared then that the court in the *Zamore* case had erroneously cited section 70(c) while intending to cite and use the theory of section 70(e).

However, in 1954, the Second Circuit Court of Appeals in the case of *Constance v. Harvey*[29] indicated that the court had in fact intended to rest the *Zamore* case squarely on section 70(c) rather than on the trustee's derivative rights under section 70(e). In the *Constance* case, a chattel mortgage on a diner was executed but not filed until ten months later. An attempted filing had been made by the attorney of the mortgagee immediately after the execution of the mortgage but the clerk of the county where the mortgage was to be recorded returned it unfiled. Failure to record the mortgage was attributable not only to the public official but also to the mortgagee's attorney. The bankruptcy of the mortgagor occurred one year after the mortgage had been recorded. The trustee, pursuant to bankruptcy proceedings, sold the mortgaged property in which the mortgagee now claimed a lien on the proceeds to the extent of the purchase price. On appeal from the district court, which had held for the trustee, the Second Circuit Court of Appeals, in its original disposition of the case, said that under section 70(c) the trustee was given a legal or equitable lien at the date of bankruptcy, *i.e.*, the date when the petition was filed. The court had noted that it did not appear whether any creditors of the bankrupt had become such in the interval between the execution and the recording of the mortgage. Under state law, it was said, the chattel mortgage became effective when filed as to creditors extending credit subsequent to the belated recording. Thus, the court correctly held that the trustee was not vested with the status of a lien creditor under section 70(c) with respect to this property unless the bankruptcy petition was filed prior to the recording of the mortgage. The district court was reversed and the case remanded with instructions to grant the validity of the lien if it were further found that the bankruptcy petition was filed after the chattel mortgage was recorded and that no creditor had a proveable claim between the execution and recording of the chattel mortgage.

However, although the trustee's petition for a rehearing was denied, the court, *sua sponte*, "corrected" its opinion in view of New York law rendering unrecorded chattel mortgages void "as to simple contract creditors becoming such, without notice, prior to actual recording . . ."[30] as contrasted to New York law on conditional sales contracts which renders such contracts "void as to creditors, without notice, who have acquired

28. American Trust Co. v. New York Credit Men's Adjustment Bureau, 207 F.2d 685 (2d Cir. 1953); *In re* Cerda, 119 F. Supp. 741 (E.D.N.Y. 1954).
29. 215 F.2d 571 (2d Cir. 1954), *cert. denied*, 348 U.S. 913 (1955).
30. *Id.* at 575. For text of statute see note 22 *supra* and accompanying text.

liens on the goods prior to recording of the contract."[31] The court reasoned that in this chattel mortgage situation an existing contract creditor without notice could have obtained a lien at the time of the filing of the petition in bankruptcy, and since under section 70(c) the trustee was an "ideal" hypothetical creditor, then the trustee could prevail over the mortgagee.

The rationale of the Second Circuit may be deduced from section 70(c) of the Bankruptcy Act without violating the literal wording of the statute. Section 70(c) merely defines the time when the trustee's lien attaches, *viz.*, at the date of bankruptcy. However, it leaves no guide to ascertain when the trustee, as the ideal hypothetical creditor, has extended the credit whereby his lien arises. Under the *Zamore* and *Constance* decisions, the trustee may relate back his hypothetical extension of credit to any suitable time when he can defeat both secured and unsecured property transfers. Such a construction of the Bankruptcy Act was questioned in a subsequent district court opinion.[32] However, a 1956 Second Circuit decision, *Conti v. Volper*,[33] followed the *Constance* case and stated that although these cases appear to reach inequitable results, the language of section 70(c) demanded that result. It would seem though, that under both state and federal law such a result is undesirable. One must note, moreover, that the Supreme Court in neither the *Bailey* nor *Martin* cases[34] construed the ideal creditor provisions of section 70(c) to allow the trustee to relate back his hypothetical extension of credit to any time prior to bankruptcy, *i.e.*, the date when his lien arose. Of course, application of state law is given as the reason for the conflict.

It must be recognized then that *Constance v. Harvey* is the law in the Second Circuit. The trustee is thereby placed in a position superior to that of any individual creditor or groups of creditors under state

31. *Id.* at 575. (Emphasis added). N. Y. UNCONSOL. LAWS § 65 (McKinney 1959). "Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale. This section shall not apply to conditional sales of goods for resale."

See also Application of American Optical Co., 38 N.Y.S.2d 663 (Surr. Ct. 1942) to the effect that the court may order the property redelivered to the seller even though there are creditors outstanding at the time of the death of the conditional buyer and where there has been no recording or notice of the transaction but where the buyer's creditors have acquired no liens on the property.

32. In the Matter of Gondola Associates, Inc., 132 F. Supp. 205, (E.D.N.Y. 1955) the court said: "The result here reached seems incongruous: a state statute enacted to protect creditors who are such at a given date is held to operate in favor of a trustee in bankruptcy who really stands in empty shoes, for he occupies a space which does not exist, since there is no creditor who might enforce the right which he asserts . . . ;" and also: "I find it difficult to reconcile the present decision with the equitable purposes of the Bankruptcy Act, but agree with the referee that the opinion in the *Constance* case seems to compel such a result. . . ."

33. 229 F.2d 317 (2d Cir. 1956). Also see *In re* Varrator, 159 F. Supp. 730 (S.D.N.Y. 1957) where the referee followed *Constance v. Harvey* but was reversed by the district court on the grounds that the mortgage was recorded within a reasonable time.

34. See notes 8-10, *supra*, and accompanying text.

law and thus may strike down the secured position bestowed on the creditor mortgagee by state law itself.[35] In short, a secured creditor under state law is no longer secured and so it would seem state law is seriously impaired as a result of these decisions. Except for bankruptcy, no creditor could have invalidated the chattel mortgage and the property now inures to the benefit of all creditors, no one of whom had been injured by the belated filing.

It is also incomprehensible why the rights and powers of a general contract creditor when bestowed on the trustee under state law should vest greater powers in that trustee than the rights and powers of a lien creditor under state law. The court in the *Constance* case reasoned that it was irrelevant under section 70(c) whether the bankruptcy petition was filed before or after the mortgage was recorded as the mortgage was void as to a simple contract creditor existing before recording and the trustee was such a creditor. However, if the case was concerned with a belatedly filed conditional sale contract, then the court would have determined whether the instrument had been filed before or after the bankruptcy petition as under state law an unfiled conditional sale contract is void only as to *lien* creditors who become such before recording.[36] Thus, as a lien creditor, the court would bestow upon the trustee only such rights as of the date of bankruptcy. The trustee's rights and powers, as an ideal hypothetical creditor should arise, if one is to be consistent, at the date of bankruptcy.

It also seems apparent that the Second Circuit decisions thoroughly confuse the various sections of the bankruptcy act. The current interpretation of section 70(c) in effect makes section 70(e) superfluous and incorporates the well defined relation back theory of section 60(a), (b)[37] into section 70(c). It is evident that sections 70(c) and 70(e) may overlap[38] since under section 70(e) the trustee has the powers to void any transaction which any existing creditor of the bankrupt could under state law or federal law while section 70(c) confers the powers of an ideal hypothetical creditor under state law at the time of bankruptcy. It is quite conceivable that an unrecorded security agreement might be voidable both under sections 70(c) and 70(e). However, to grant the trustee the power under section 70(c) to assume the position of any conceivable creditor is to grant the trustee any power an actual creditor may have at the bankruptcy under state law to void any particular transaction. Also, section 60(a),(b) was designed to reach any perfection of a previous transfer within four months of the petition in bankruptcy. However, the operation of section 60(a),(b) has been elaborately and

35. See, *e.g.*, *In Re* Myers, 19 F.2d 600 (N.D.N.Y. 1926). A creditor whose claim came into existence after the recording of the chattel mortgage could not invalidate the mortgage no matter how late the filing occurred.
36. See note 31, *supra*.
37. See note 11, *supra*.
38. See, *e.g.*, Matter of Farm & Home Co., 84 F.2d 933 (6th Cir. 1936).

carefully circumscribed by the Bankruptcy Act. The *Constance* case on the contrary does not spell out how the trustee may wield his section 70(c) power. Therefore, the trustee may relate back his hpothetical extension of credit to any reasonable date preceding bankruptcy in order to void any belatedly recorded agreement and is not limited by the four month limitation of section 60(a),(b).

III.

APPLICATION OF CONSTANCE V. HARVEY RATIONALE BY OTHER COURTS.

A Sixth Circuit decision, *In re Cotter,*[39] reached a result similar to that later reached by the Second Circuit in the *Zamore* case.[40] A chattel mortgage executed on June 26, 1952, and recorded July 2, 1952, was declared void as to the trustee in bankruptcy when, in the interim an unsecured creditor extended credit to the bankrupt. The court held the chattel mortgage void as to the trustee on the basis of both sections 70(c) and 70(e). The decision should have been limited to section 70(e) alone. In a later decision,[41] the court specifically cited and followed the *Constance* case saying: "As stated in *Constance v. Harvey* . . . where a creditor without notice of the petitioner's unrecorded assignment could have obtained a lien at the time of bankruptcy, the trustee under section 70, sub. c is entitled to the rights and remedies of such an 'ideal' hypothetical creditor." However, the case is not on its facts on point for in this instance there was no recording at all of the deed in question.

In a recent decision of the Fifth Circuit Court of Appeals,[42] the court applied section 70(c) in a manner similar to that of the Second Circuit in the *Constance* case. The court considered the question of a belatedly filed chattel mortgage where an intervening creditor had obtained and enrolled a judgment against the bankrupt between the execution and the recording of the mortgage. Therefore, although it was a proper case for the application of section 70(e) of the Bankruptcy Act, the court in addition held that section 70(c) also operated in favor of the trustee, citing both the *Constance* and *Conti* decisions. However, the court then footnoted its decision by stating that if the criticism of the *Constance* case is correct, the decision can rest on section 70(e) alone. A district court had previously cited the *Constance* decision in an instance involving unrecorded counter letters,[43] but here section 70(c) was clearly applicable.

In a 1954 case,[44] a referee in the Seventh Circuit determined that a chattel mortgage had been illegally executed under Illinois law and that the

39. 113 F. Supp. 859 (E.D. Mich. 1953).
40. See note 25 *supra*, and accompanying text.
41. Matter of Plymouth Glass Co., 171 F. Supp. 650 (E.D. Mich. 1957).
42. Brookhaven Bank & Trust Co. v. Gwin, 253 F.2d 17 (5th Cir. 1958).
43. Mayo v. Petty, 153 F. Supp. 501 (W.D. La. 1957).
44. *In Re* Kranz Candy Co., 214 F.2d 588 (7th Cir. 1954).

trustee under section 70(c) could void the agreement. The mortgagee had claimed that as there were no creditors at the time of bankruptcy who had extended credit before the mortgage had been executed, then the trustee could not assume a position superior to any creditors whom he represented. The court of appeals affirmed the referee's decision holding the trustee could avoid the transaction though there were no creditors with claims extending back to the date of the mortgage. The trustee under section 70(c) was an ideal hypothetical creditor and not in a derivative position as under section 70(e). The correctness of the decision turns entirely on the law of Illinois.[45] If the mortgage under state law was void as to creditors with claims arising at the date of bankruptcy but enforceable against the bankrupt, then the trustee as the ideal, hypothetical creditor could assume the powers of a simple contract creditor and rely on section 70(c). On the other hand, if the mortgage under state law was void only as to creditors whose claims arose previous to the execution of the mortgage, then the trustee should rely only on section 70(e) and to cite section 70(c) would be to invoke the same questionable rationale applied in the *Constance* decision.

In a recent decision in the Ninth Circuit, *United States v. England,*[46] the court of appeals held that the trustee in bankruptcy was not a "judgment creditor" as used in section 3672 of the Internal Revenue Code[47] and so the government's unrecorded tax lien was prior to the trustee's rights under section 70(c). The court said that the trustee was not in the position of a creditor "holding a judgment obtained by judicial proceedings."[48] This was a case involving the priority of a federal tax lien as opposed to the rights of a trustee in bankruptcy under section 70(c), and admittedly the cases do not treat the federal government as they do other creditors. However, it would appear that the court in the light of Congress' intent in passing the Bankruptcy Act and according to the history and wording of the act, was clearly in error.[49] The status of a judgment creditor is not bestowed upon the trustee in the literal reading of the statute, but it would appear that the trustee as an ideal hypothetical creditor must also be a judgment creditor. Thus, this court refused to grant the powers customarily bestowed upon the trustee. The ground of distinction is even more imperceptible if one considers further *England v. Sanderson.*[50] In this instance the court argued that the trustee assumed

45. ILL. REV. STAT., ch. 32, § 1576 (1953). The court here found there was an illegal transaction under the statute when an insolvent corporation purchased shares of its own stock and executed and delivered notes and chattel mortgages to secure payment. The transaction had not been entered into in good faith.

46. 226 F.2d 205 (9th Cir. 1955). See also *In Re* Taylorcraft Aviation Corp., 168 F.2d 808 (6th Cir. 1948).

47. Int. Rev. Code of 1939, § 3672 (now INT. REV. CODE of 1954, § 6323).

48. The court relied on United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953) and United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950). These cases do not substantiate the decision of the Ninth Circuit as neither of the above cases involved the rights of the trustee under federal law.

49. United States v. England, *supra* note 46 at 207.

50. 236 F.2d 641 (9th Cir. 1956).

the powers of a pre-existing creditor who could have obtained a lien at bankruptcy to avoid the exemption filing under state law. Some creditors had extended credit prior to the filing of the exemption by the bankrupt when the exemption was for $7,500. When the bankrupt did file his exemption two months prior to bankruptcy, the exemption allowed under California law was $12,500. The court used section 70(c) and the *Constance* case to reduce the exemption allowed to $7,500. Why the trustee should be given the power to relate back his hypothetical extension of credit to some time prior to bankruptcy but be denied the status of a judgment creditor by the same court, cannot be deduced from a literal reading of the Bankruptcy Act or as a logical outgrowth of the history of the act.

A district court in the Eighth Circuit has refused to follow *Constance v. Harvey*.[51] That case concerned a belatedly filed chattel mortgage where no creditor had a claim arising between the date of execution and recording of the mortgage. It was held that section 70(c) did not bestow any rights or powers on the trustee under state law to avoid the mortgage. Similarly, the First Circuit has declared that the *Constance* and *Conti* decisions have placed "a cloud on the distinction between the rights, remedies and powers of the trustees under section 70, sub. c and the derivative rights enjoyed by the trustee under section 70, sub. e of the Bankruptcy Act."[52]

On similar facts, the Third Circuit has refused to apply section 70(c) as it was applied in the *Constance* case. In the case of *In Re Consorto Constr. Co.*,[53] there was a belatedly filed chattel mortgage. The Third Circuit held that the late filing under the Pennsylvania Chattel Mortgage Act[54] perfected the lien of the mortgagee as of the date of recordation. Later creditors, and thus the trustee also, were subordinated to the interest of the mortgagee lienor. The trustee's position under section 70(c) was deemed to be that of a subsequent lienor. The court added that even under section 70(e) the trustee, acting in behalf of existing creditors who had obtained liens between the execution and recording of the chattel mortgage, could not invalidate the mortgage, as state law provided only for subordination, not invalidation. The *Consorto* case, while applying a different interpretation of section 70(c), is not necessarily contrary to the *Constance* decision as the case may be distinguished on the basis of state law. However, it would appear that the *Consorto* application of section 70(c) protects Article 9 of the Uniform Commercial Code from the Second Circuit theory of relating back the trustee's hypothetical extension of credit to a time prior to bankruptcy.

51. In the Matter of Herman Billings, 170 F. Supp. 253, 258 (W.D. Mo. 1959). The court stated: "I think the construction placed on the statute in the *Constance* case was clearly erroneous, and that it was never intended to give the trustee in bankruptcy any such authority as that case holds."

52. *In re* Pierro, 159 F. Supp. 497, 498 (S.D. Me. 1958).

53. 212 F.2d 676 (3d Cir.), *cert. denied,* 348 U.S. 833 (1954).

54. Pa. Laws 1945, act 1358 (repealed).

A Third Circuit district court, in the matter of *American Textile Printers Co.*,[55] distinguished the *Constance* and *Conti* cases as a result reached on the basis of New York law through an interpretation of its chattel mortgage act. In the present case, there was a belated recording of a conditional sale before bankruptcy, but the trustee, as an ideal hypothetical creditor, could not void the transaction. The court claimed that the New Jersey conditional sale statute[56] occasioned a different result. However, the court footnoted its decision by stating that, in any case, it considered the *Constance* decision as an erroneous application of section 70(c).

It would appear that these later cases reach a more equitable result both in regard to enforcing state law and at the same time not rendering the state's provisions as to security agreements a nullity because of a strained reading of section 70(c) of the Bankruptcy Act.

CONCLUSION

It is submitted then, that the decisions of the Second Circuit construing section 70(c) of the Bankruptcy Act are erroneous. To interpret the trustee's position as an ideal hypothetical creditor who can relate back his hypothetical extension of credit to a date before the filing of the bankruptcy petition is to unnecessarily extend the trustee's powers. It is clear that secured creditors not only in the Second Circuit but in all other circuits citing the *Constance* case as authority for their decisions must realize that the trustee's rights and remedies have been measurably increased by these cases.

The best method to rectify these decisions would be for Congress to amend section 70(c) of the Bankruptcy Act so as to provide that the trustee may not relate back his lien acquired by legal or equitable proceedings at the date of bankruptcy to any time before the date of bankruptcy.[57] Any amendment to section 70(c) should destroy the trustee's right to relate back his lien so as to destroy the lien of a secured party by

55. 152 F. Supp. 901 (D. N.J. 1957).

56. N.J. Stat. Ann. § 46:32-11 (1959) provides: "Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as provided in this chapter, unless such contract or copy is so filed within ten days after the making of the conditional sale." See also In the Matter of Lukenbill, 156 F. Supp. 129 (E.D. Pa. 1957). The court distinguished the *Consorto* and *Constance* decisions since in this instance the attempted recording was never completed under the requirement of Pennsylvania law and thus in effect there was no recording of the security agreement at all. The trustee then could avoid the agreement under section 70(c). See PA. STAT. ANN. tit. 12A, § 9-109, 9-302, 9-303(1), 9-401(1) (1953).

57. See Summary of Proceedings, National Bankruptcy Conference 1956, Annual Meeting, at 57, where Professor MacLachlan suggests the following amendment to section 70(c): "The trustee in bankruptcy shall have as of the date of bankruptcy (and without the benefit of any fiction of relation back prior to bankruptcy) the rights and powers of: . . . ."

a belated recording of the agreement. It should also preserve the distinction between sections 70(c) and 70(e) so that the trustee's remedy in the situation of a belated filing is limited to his subrogated rights derived from an existing creditor who has extended credit in the period between the date of execution and the date of the recording of the mortgage.

However, there is an instance reported where state law on the filing requirements of a chattel mortgage in insolvency proceedings has validated a lien which otherwise would have been voidable by the trustee under the *Constance* case.[58] Michigan chattel mortgage law provided, including the statute and cases interpreting it,[59] that a chattel mortgage to be valid must be filed immediately but an allowance of fourteen days is permitted to record the mortgage when the question of the validity of the lien is raised in insolvency proceedings. Here, the mortgage was not filed immediately but was recorded within the fourteen-day allowance in insolvency proceedings. The court assumed but did not decide that under the *Constance* decision the mortgage would be void. However, it was held that the powers granted to a trustee under section 70(c) are determined by state law and the trustee's powers arise at the date of bankruptcy under section 70(c). Yet, state law in this instance, it was said, did not strip the trustee of any of his powers and remedies as the trustee never acquired the powers under the state law.

This, of course, is a questionable decision[60] as it may be interpreted as an attempt by a state to deny the use of its statute to a trustee in a federal bankruptcy proceeding, thus in conflict with the supremacy clause of the Constitution.[61] Thus, it is advisable that any action taken to rectify the *Constance* decision should be by Congress alone.

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58. *In Re* Matter of Hyman Freeman, 168 F. Supp. 25 (E.D. Mich. 1958).

59. MICH. STAT. ANN. § 26.929 (1956). "Every mortgage of conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed . . . : Provided, however, that any such mortgage shall not be void in the case of insolvency proceedings as against the creditors of the mortgagor if filed within 14 days from the date thereof . . . ." Also see Ransom & Randolph Co. v. Moore, 272 Mich. 31, 261 N.W. 128 (1935), to the effect that a chattel mortgage must be recorded immediately; otherwise it is ineffective against general creditors who extend credit between its execution and the recording.

60. MacLachlan, *Two Wrongs Make a Right,* 37 TEXAS L. REV. 676 (1959).

61. U. S. CONST. Art. VI, § 9.

INTERNATIONAL LAW—WORLD COURT—NEED FOR RE-EVALUATION OF THE CONNALLY RESERVATION.

Within the past thirteen years, thirty-eight member-States of the United Nations have accepted the compulsory jurisdiction of the World Court under article 36 of the Statute of the International Court of Justice.[1] However, most of these acceptances of compulsory jurisdiction are subject to a condition of reciprocity and exclude specific kinds of disputes. In accepting compulsory jurisdiction, the United States qualified its acceptance by appending thereto the Connally Reservation which, in effect, makes such acceptance limited to those matters which do not fall within the domestic jurisdiction of the United States, the United States reserving the right to interpret the phrase "domestic jurisdiction." The purpose of this Comment is to discuss the motivating force behind the acceptance of compulsory jurisdiction, the qualification thereof by the Connally Reservation and its resulting effects. The scope of jurisdiction of the World Court over international conflicts will be discussed. Arguments, both legal and political, will be analyzed, dealing with both the retention and the removal of the Connally Reservation. Before the Connally Reservation is discussed, however, a summary of the historical developments leading up to the establishment of the present World Court[2] will be helpful to a better understanding of the existing problem.

I.

HISTORICAL DEVELOPMENT OF ARBITRATION AND A WORLD COURT.

Although Grotius is conceded to be the father of modern international law,[3] the first attempt to formulate an international arbitral court is generally attributed to the Greek, Amphictyonies, who established a commission to deal with problems arising among the Grecian States.[4] Later, the Romans encouraged and practiced arbitration, even applying foreign law to those conflicts involving a non-Roman citizen.[5] When the Roman Empire was destroyed in the fifth century, the Church assumed the role as arbiter of any conflict arising between nations.[6] Throughout the Middle

1. See note 21 *infra*.
2. The term "World Court" is used henceforth to include the Permanent Court of International Justice, which functioned from 1922 to 1940, or the International Court of Justice which has been in existence since 1946.
3. See Fenwick, *The Sources of International Law*, 16 MICH. L. REV. 393, 396 (1918); Pollack, *The Sources of International Law*, 2 COLUM. L. REV. 511, 517-19 (1902).
4. DE BUSTAMANTE, THE WORLD COURT 1 (3d ed. 1926). For a different opinion, see Wehle, *Comparative Law's Proper Task For the International Court*, 99 U. PA. L. REV. 13, 15 (1950).
5. See DE BUSTAMANTE, *op. cit. supra* note 4, at 2.
6. See Brown, *International Courts*, 20 YALE L. J. 1, 2 (1910).

Ages, the Church was the primary force behind the continued growth of international law and arbitration in Western Europe.[7] The Reformation, however, destroyed religious unity and also reduced the great powers of Western Europe to States of equality by the Treaty of Westphalia.[8] By recognizing the independent sovereignty of the States of Western Europe and their exclusive jurisdiction over their own territory, the Congress of Westphalia marked the true beginning of modern international law,[9] and a step toward the existence of a World Court.

In 1899, the Hague Conference[10] developed from an *ad hoc* system of arbitration which had served to decide disputes arising out of treaties, boundaries or other international conflicts.[11] Though the Conference succeeded only in evoking an opinion concerning the question of restrictions on military charges and armament limitation agreements,[12] it did result in the formation of the Permanent Court of Arbitration,[13] this being the earliest significant attempt to standardize the procedure of arbitration.[14] The Hague Conference of 1907 initiated the International Prize Court which imposed compulsory arbitration in a limited class of cases upon its members.[15] However, the convention proposing a World Court failed because some of the members were not prepared to accept compulsory jurisdiction in international conflicts.[16]

In 1920, the League of Nations established the Permanent Court of International Justice.[17] Forty-two nations accepted the compulsory jurisdiction of the Court, the fact that acceptance of compulsory jurisdiction was optional having been instrumental in its successful establishment.[18] The Court sat from 1922 to 1940, handling sixty-five cases, rendering

7. Wehle, *Comparative Law's Proper Task for the International Court,* 99 U. PA. L. REV. 13, 16 (1950). Until the fifteenth century, the Church promoted and sanctificed treaties and acted as arbiters in disputes.

8. See DE BUSTAMANTE, *op. cit. supra* note 4, at 5.

9. Foster, *The Evolution of International Law,* 18 YALE L. J. 149, 153 (1908). Grotius, the great Dutch publicist, had advocated a congress of States where disinterested parties would decide international disputes and have authority to compel the parties to accept the peace imposed. This specific proposal did not materialize, but twenty-three years later the Congress of Westphalia emerged.

10. The Conference was comprised of twenty European nations, four Asiatic nations and two American nations.

11. See Foster, *supra* note 9, at 151.

12. Brown, *supra* note 6, at 6. That little attention was paid to the restrictive opinions of the Conference was evidenced shortly thereafter by Russia's action in going to war with Japan. Ironically enough, it had been Russia who had initially proffered the theory of the Conference.

13. A considerable number of arbitrations have been conducted by tribunals formed under the Permanent Court of Arbitration. See SCOTT, HAGUE COURT REPORTS (1916); WILSON, THE HAGUE ARBITRATION CASES (1915).

14. See SCOTT, THE HAGUE CONVENTIONS OF 1899 AND 1907 41 (2d ed. 1915). The United States was among the fifty-two ratifying States. Its ratification instrument contained a reservation excluding "purely American questions."

15. See Brown, *supra* note 6, at 7-8.

16. See DE BUSTAMANTE, *op. cit. supra* note 4, at 47, 66.

17. With respect to this Court, as well as the process of peaceful settlement of international disputes, a standard work is HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 (1943).

18. *Id.* at 779.

thirty-two decisions in contentious cases and twenty-seven advisory opinions.[19]

In 1948, the International Court of Justice replaced the Permanent Court of International Justice.[20] Only thirty-eight nations have accepted compulsory jurisdiction by this Court.[21]

II.

JURISDICTION OF THE WORLD COURT.

A.

The Subject Matter in Dispute.

The competency of the International Court of Justice extends to all cases referred to it and to all cases over which it is specifically given jurisdiction in the United Nations Charter, in treaties, or in conventions in force.[22] Additional compulsory jurisdiction may be conferred at the option of States which are parties to the statute of the International Court,[23] including all members of the United Nations.[24] The acceptance of such compulsory jurisdiction may be conditioned upon reciprocity, or may be confined to a specified period of time.[25] When this option has been exercised by declaration the Court's jurisdiction is extended to any dispute arising over:[26]

"a. the interpretation of a treaty;

19. See Hudson, *The Twenty-Fifth Year of the World Court,* 40 AM. J. INT'L. L. 1 (1947).

20. See Schwarzenberger, *Trends in the Practice of The World Court,* 4 CURRENT LEGAL PROBLEMS 1 (1951).

21. The States which currently have effective declarations of adherence filed with the Secretariat of the United Nations are: Austria, Belgium, Cambodia, Canada, China, Columbia, Denmark, Dominican Republic, El Salvadore, Finland, France, Haiti, Honduras, Israel, Japan, Liberia, Liechtenstein, Luxembourg, Mexico, The Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Philippines, Portugal, The Sudan, Sweden, Switzerland, Thailand, Turkey, Union of South Africa, United Arab Republic, United Kingdom, United States of America and Uraguay.

22. STAT. INT'L CT. JUST. art. 36, para. 3. "The jurisdiction of the court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and convensions in force."

23. STAT. INT'L CT. JUST. art. 36, para. 2.

24. U. N. CHARTER art. 93, para. 1. "All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."

25. See STAT. INT'L CT. JUST. art. 36, para. 3.

26. Article 36, para. 2 provides: "The states parties to the present statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning . . . ."

Many States were disposed to drop the option left to the Statutes by article 36 of the 1920 statute (Permanent Court of International Justice) when revision was undertaken in 1945 to prepare the Statute of the International Court of Justice, and to make recognition of compulsory jurisdiction obligatory for every party to the revised statute. This proposal did not prevail at San Francisco largely because of the opposition of the United States and the Soviet Union, neither of which had become a party to the 1920 statute. Hudson, *The World Court,* 32 A.B.A.J. 832-33 (1946).

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation."

Except where jurisdiction is thus conferred, no means are available by which a would-be plaintiff State may bring another State before the Court without the latter's consent.[27]

There is another restraint on the Court's jurisdiction which is of paramount importance in any discussion concerning the Connally Reservation. Jurisdiction is limited to disputes concerning matters which are not essentially domestic in character. The Court, being an organ of the United Nations,[28] is bound by its Charter provisions prohibiting intervention in such matters.[29] Left open by the Charter and the statute, however, is the definition of what is within the domestic jurisdiction of a state and conversely without the jurisdiction of the Court. This problem will be considered in some detail subsequently.

B.

The Parties to the Dispute.

Having thus set out the Court's limited jurisdiction over subject matter, it is now necessary to consider the competency of parties to sue or be sued therein. Only States may be parties before the Court.[30] The rigidity of this rule is somewhat mitigated insofar as the United Nations itself is concerned. Not being a State, it cannot appear before the Court. It may, however, request the Court to give an advisory opinion on any legal issue.[31] This includes a legal question involving a dispute to which the United Nations is a party.[32] It is symptomatic of the inadequacy of article 36 of the statute that although the Court has held that the United Nations is a subject of international law and can put forward an international claim,[33] it is precluded from bringing that claim before its own principal judicial organ.[34]

Individuals have no capacity to sue or be sued before the Court under article 36, paragraph 1. However, claims of an individual can

27. See, BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS 58 (1953).
28. U. N. CHARTER art. 7, para. 1; STAT. INT'L CT. JUST. art. 1.
29. U. N. CHARTER art. 2, para. 7; Interpretation of the Peace Treaties with Bulgaria, Hungary and Roumania, [1950] I.C.J. Rep. 65, 70: "The Court as an organ of the United Nations is bound to observe the provisions of the Charter including Article 2, paragraph 7."
30. STAT. INT'L CT. JUST. art. 34, para. 1.
31. STAT. INT'L CT. JUST. art. 65, para. 1.
32. 2 OPPENHEIM, INTERNATIONAL LAW 54-55 (7th ed. Lauterpacht 1948).
33. Reparation for Injuries Suffered in Service of the United Nations, [1949] I.C.J. Rep. 174.
34. 2 OPPENHEIM, INTERNATIONAL LAW 57 (7th ed. Lauterpacht 1948).

sometimes be indirectly considered through a claim by the State of which the individual is a subject. Of course, in such a proceeding the claim is actually made by the State on the basis of an injury to the subject being an injury to the sovereign.[35]

An additional limitation is found in the provisions that only particular States — those parties to the statute — may sue or be sued in the Court.[36] All members of the United Nations are ipso facto parties to the statute and are competent to appear.[37] The Charter also provides that any State not a member may become a party to the statute on conditions to be determined by the General Assembly on the recommendation of the Security Council.[38] These conditions shall in no case place the parties in a position of inequality before the Court.[39]

III.

THE MORSE RESOLUTION AND THE CONNALLY RESERVATION.

On August 2, 1946, the Morse Resolution was passed by a sixty-to-two vote in the United States Senate.[40] In accordance with the "advice and consent" treaty-making provisions of the federal constitution,[41] the Morse Resolution authorized the President of the United States to deposit with the Secretary-General of the United Nations a Declaration of Adherence to the optional compulsory jurisdiction clause of the Statute of the International Court.[42]

Until this time the United States had been deterred from participating actively in any type of World Court by a long-standing tradition of the United States Senate that no obligation to arbitrate or adjudicate international disputes be undertaken unless a special agreement, consented by a two-thirds vote of the Senate, had been entered into with an individual State.[43] The proponents of the Morse Resolution, however, believed that this tradition could no longer be adhered to.[44] It was felt that isolationism was dead,[45] and rejection of compulsory jurisdiction would defeat the very purpose of the San Francisco Conference.[46] In addition, since other member-States of the Court which had declared their adherence to the

35. Mavromatis Palestine Concessions, P.C.I.J., ser. A, No. 2, at 6 (1924).
36. STAT. INT'L CT. JUST. art. 34, para. 1.
37. See note 24 *supra*.
38. U. N. CHARTER art. 93, para. 2.
39. STAT. INT'L CT. JUST. art. 35, para. 2.
40. S. Res. 196, 79th Cong., 2d Sess. (1946); see Morse, *Significance of the Senate Action for International Justice Thru Law*, 32 A.B.A.J. 776 (1946).
41. U. S. CONST. art. II, § 2.
42. The Declaration is found at 61 Stat. 1218, 1 U.N.T.S. 9 (1946).
43. See 91 CONG. REC. 8247 (1945) (remarks of Senator Vandenberg).
44. See Morse, *supra* note 40, at 777.
45. *Ibid.*
46. See Morse, *supra* note 40, at 778. "The time has come to find out whether or not the United States government, insofar as the Senate of the United States is concerned, is ready to live up to the moral obligations so clearly crystallized in the Resolution passed at the San Francisco Conference."

"optional clause" were not subject to the compulsory jurisdiction of the Court in any action brought by another member-State which had not declared its adherence to such clause, failure by the United States to accept compulsory jurisdiction would seriously limit its powers as a plaintiff in the Court.[47]

Article 2(7) of the Charter of the United Nations provides: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State. . . ."[48] Article 36(6) of the Statute of the International Court of Justice provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."[49] Consistent with Article 2(7), the Morse Resolution provides that the Declaration of Adherence by the United States should not apply to "disputes with regard to matters essentially within the domestic jurisdiction of the United States."[50] The Connally Reservation, however, inconsistent with article 36(6), appended to the Morse Resolution the reservation "as determined by the United States of America."[51]

In effect, the Connally Reservation reserves to the United States the right to determine whether any dispute to which it is a party involves a matter within its domestic jurisdiction. The reservation thereby strips the Court of its ancillary jurisdiction[52] to determine whether or not it is competent to hear the case. This constitutes a veto power, reserved by the United States, which it may use in any case, whether or not it realistically concludes that the problem is within its domestic jurisdiction.[53] Exclusive of a special agreement or treaty with another nation, the Connally Reservation emasculates the Morse Resolution since the United States need not accept compulsory jurisdiction even though it has declared its adherence thereto. It may, at its discretion, accept jurisdiction on an *ad hoc* basis.[54] The only advance which appears to have been made over the practice of the United States as it existed prior to the Morse Resolution as amended by the Connally Reservation is that any determi-

47. See 92 CONG. REC. 10557, 10630 (1946); STAT. INT'L CT. JUST. art. 36, para. 3.

48. U. N. CHARTER art. 2, para. 7.

49. STAT. INT'L CT. JUST. art. 36, para. 6.

50. See S. Res. 196, 79th Cong., 2d Sess. (1946); 5 DEP'T STATE BULL. 452 (1946).

51. *Ibid.* The Morse Resolution, as amended by the Connally Reservation, reads as follows in § b:

"*Provided,* That such declaration should not apply to—

b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."

52. STAT. INT'L CT. JUST. art. 36, para. 6.

53. See Preuss, *The International Court of Justice,* 32 A.B.A.J. 660-61 (1946); Wagner, *Is a Compulsory Adjudication of International Legal Disputes Possible?,* 47 NW. U. L. REV. 21, 36 (1952).

54. See Becker, *Some Political Problems of the Legal Adviser, Proceedings,* AM. SOC. OF INT. LAW 266-67 (1958) citing United Nations, Introduction to Annual Report for 1956-57 by Sec't Gen.

nation of what is or is not a matter of domestic jurisdiction is to be made by the President without the advice and consent of the Senate.[55]

Prior to the Connally Reservation, no other nation, as a member of the Permanent Court of International Justice or of the International Court of Justice, had made its Declaration of Adherence to compulsory jurisdiction expressly conditional upon a self-judging domestic jurisdiction clause.[56] The effect of the reservation on the attitude of other member-States of the Court is evidenced by the fact that six other nations expressly included a similar reservation in their Declaration of Adherence after the passage of the Connally Reservation.[57]

IV.

THE CONSTITUTION AND ACCEPTANCE OF COMPULSORY JURISDICTION.

It is a recognized principle of international law that provisions of a State constitution have no effect on the international obligations of a treaty.[58] This rule has often been accepted by the United States.[59] However, in discussing the constitutional matters connected with the Connally Reservation this principle must be disregarded and purely municipal (*i.e.,* internal) law considered. If the rule of international law were applied any consideration of constitutional problems would of necessity be precluded.

Initially, a determination must be made as to the constitutionality of the Senate's insertion of the reservation. Treaties, of which the United States' declaration under article 36, paragraph 2 of the statute is one,[60]

55. See Morse, *supra* note 40, at 776.

56. Hudson, *The World Court,* 32 A.B.A.J. 832 (1946).

57. Those states are Mexico, France, Liberia, Union of South Africa, Pakistan and the Sudan. France has since withdrawn its reservation.

58. In its opinion on Treatment of Polish Nationals in Danzig, P.C.I.J., ser. A/B, No. 44, at 24 (1932), the World Court ruled that a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force. See also Free Zones Case, P.C.I.J., ser. A, No. 24, at 12 (1930); Declaration of Rights and Duties of States, U.N. General Assembly, OFFICIAL RECORDS, Fourth Session, Supp. No. 10 (A-925), pp. 8-9.

59. Hackforth, Hearings on S. 1385. Before the Subcommittee of Committee on Commerce, 79th Cong. (1944) at 230: ". . . in international law the head of the government is entitled to speak for the State, and if the President enters into an obligation with a foreign government, that foreign government is entitled to rely upon it. It is not under the obligation of inquiring into our constitutional processes." See also statement by Secretary of State Bayard in 1887 U. S. FOREIGN REL. 751, 753. However, in the Interhandel Case [1957] I.C.J. Rep. 105, the United States did contend that the Constitution can be so used. See 36 DEP'T STATE BULL. 350, 357 (1957) for American note to the Swiss Government to this effect.

60. A treaty has been defined as a "formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves, the international juridicial effect of [which] is not dependent upon the name given to the instrument." Harvard Research, *Draft Covenant on the Law of Treaties,* 29 AM. J. INT'L L. 686, 710 (Supp. 1935). The Statute of the International Court of Justice clearly falls within this definition. This treatment has been given to the United Nations Charter — of which the statute is an integral part — in Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

are made by the President[61] with the advice and consent of the Senate.[62] The Senate may withhold its consent or give a qualified consent.[63] The Senate did the latter when it appended the Connally Reservation to the Declaration of Adherence. Obviously this was within the powers of that body.[64] Having thus disposed of the preliminary question it must now be determined whether or not the declaration without the reservation is constitutional. The two basic areas of purported constitutional conflict and the arguments thereunder are discussed below.

A.

The World Court and Article III of the Constitution.

The argument has been advanced that compulsory jurisdiction results in an unconstitutional grant by the President and the Senate of the judicial power of the United States in derogation of the Constitution.[65] Article III gives the Supreme Court jurisdiction over disputes involving the interpretation of treaties and disputes to which the United States is a party.[66] The argument is made that the Constitution is violated by giving the World Court jurisdiction over much the same type of controversy. Since the World Court has been given its jurisdiction over the United States by treaty, the question is basically one of the extent of the treaty power. Could this jurisdiction be given by treaty?

The treaty power extends to all matters appropriate to our external relations.[67] A distinction must therefore be made between the external powers and the internal powers of the government.[68] As to the former the nation has the power to make any agreement whatever.[69] Bearing this principle in mind it is clear that membership in the World Court is a valid exercise of the treaty power and creates no difficulties to the extent that its jurisdiction is limited to external matters.[70] The grants of jurisdiction in article III of the Constitution were intended to affect state-federal relations only.[71] Further support is lent to this proposition by the principle frequently expressed that the Constitution has no extra-territorial effect.[72] Since the World Court can adjudicate only disputes as

61. Holden v. Joy, 84 U.S. 211 (1872).
62. Haver v. Yaker, 76 U.S. 32 (1869).
63. *Ibid.*
64. Clark v. Braden, 57 U.S. 635 (1853).
65. Ely, *Treaty-Making Power: The Constitutionality of the International Court of Justice*, 36 A.B.A.J. 738 (1950).
66. U. S. CONST. art. 3.
67. Santovencenzo v. Egan, 284 U.S. 258 (1931); Asakura v. Seattle, 265 U.S. 332 (1923); Holden v. Joy 84 U.S. 211 (1872).
68. United States v. Curtis-Wright, 299 U.S. 304 (1936).
69. Missouri v. Holland, 252 U.S. 416 (1919); Holden v. Joy 84 U.S. 211 (1872). See Hughes, *Proceedings*, AM. SOC. OF INT. LAW 194-96 (1929).
70. See Ely, *supra* note 65, at 800.
71. The Koenigen Luise, 184 Fed. 170 (1910).
72. *In re* Ross, 279 U.S. 852 (1928); Neeley v. Kenkel, 180 U.S. 126 (1900).

to external matters, it cannot be said to conflict with the Constitution which has only internal effect. There is no common ground on which such a conflict could arise.

B.

Effect Upon the Bill of Rights and Other Constitutional Provisions and Restraints.

Opponents predict that the compulsory jurisdiction of the World Court will result in the eventual deprivation of the individual guarantees of the Bill of Rights.[73] It is feared that an inferior international Bill of Rights will be substituted for articles I to VIII.[74] The basis of this argument seems to stem from the theory that the Declaration of Human Rights[75] or the Genocide Convention[76] will become international law, that the World Court will be called upon to apply them, and will do so to the detriment of the United States.[77] This would allow amendment of the Constitution in a manner other than that prescribed in article V.[78] The theory supporting these contentions is that since the statute of the Court — the adherence to which the Connally Reservation is attached — is a treaty,[79] a decree issued pursuant thereto would be the supreme law of the land by virtue of article VI.[80] This would be true but only to a limited extent as seen below.

If the decree of the World Court purported to do what the Constitution forbids, the Supreme Court would declare it void[81] even though it would still be effective internationally.[82] This would follow because the treaty power of the United States is subject to limitation.[83] While it is

73. Holman, *Treaty Law-Making: A Blank Check for Writing a New Constitution*, 36 A.B.A.J. 707 (1950).
74. *Ibid.*
75. U. N. CHARTER arts. 55 (c), and 56.
76. *Ibid.*
77. It must be borne in mind that the Declaration of Human Rights is not intended to be a treaty, but rather a goal for which all nations should strive — it is not intended to create international law. 19 DEP'T STATE BULL. 751 (1948).
78. Satterfield, *Constitutional Amendment by Treaty*, 24 MISS. L. J. 280 (1954).
79. See note 60 *supra.*
80. United States v. Pink, 315 U.S. 203 (1942); Santovencenzo v. Egan, 284 U.S. 258 (1931); United States v. Minnesota, 270 U.S. 181 (1925); Asakura v. Seattle, 265 U.S. 332 (1923); Nielson v. Johnson, 229 U.S. 47 (1912); Clark v. Braden, 57 U.S. 635, (1853).
81. No treaty has ever been declared void. However, in Reid v. Covert, 354 U.S. 1 (1956), the Court refused to enforce an executive agreement. In addition, Asakura v. Seattle, 265 U.S. 332 (1923) held that a treaty stands on the same footing as the federal constitution and operates without aid of any legislation when self-executing. Such treaties are equivalent to an act of Congress. Valentine v. United States, 299 U.S. 5 (1936); Whitney v. Robertson, 124 U.S. 190 (1888); Kennett v. Chambers, 14 U.S. 38 (1887). The Court, of course, can hold an act of Congress invalid. With these principles in mind, it would appear that the language in The Koenigen Luise, 184 Fed. 170, 173 (1910), is a correct statement of the law. There the court said ". . . it is the duty of the court to annul the provisions of a treaty that are clearly violative of the organic law . . . ."
82. See note 58 *supra.*
83. Reid v. Covert, 354 U.S. 1 (1956).

true that for many years the Supreme Court has adopted the view that the federal government has the authority to make any agreement whatever that relates to the conduct of international affairs,[84] it must also be borne in mind that the government's power as to external matters is distinguishable from its power as to the internal matters.[85] It is only as to the former that its powers are unlimited.

The executive branch, as early as 1854, has stated that the Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other.[86] This is in accordance with the expressions of some authorities on the Constitution.[87] The theory that a power given by the Constitution cannot be so construed as to authorize destruction of other provisions of the same instrument certainly has the strength of the legal logic supporting it.[88] The Supreme Court has adopted this view in *The Cherokee Tobacco:*[89] "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." A search of the cases reveals that at no time has the Supreme Court rejected this doctrine.[90] *Reid v. Covert,*[91] a 1956 case, appears to follow this rule and reaffirms the principle that treaties are subject to constitutional limitations. This case is of particular significance since it was decided after the United States became a party to the Statute of the International Court of Justice. The Supreme Court said:

> "It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who created the Bill of Rights — let alone alien to our entire constitutional history and tradition — to construe article 6 as permitting the United States to exercise power under an international agreement without observing constitutional procedures. In effect such construction would permit amendment of that document in a manner not sanctioned by article 5. The prohibitions of the Constitution were designed to apply to all branches of the national government and they cannot be nullified by the Executive or by the Executive and the Senate combined."

Since a decree of the World Court would have no greater effect than that from which it springs — the treaty by which the United States became subject to the Court's jurisdiction — it follows that the decree also must

84. Santovencenzo v. Egan, 284 U.S. 258 (1931); Missouri v. Holland, 252 U.S. 416 (1919); Geofroy v. Riggs, 133 U.S. 258 (1889); Holden v. Joy, 84 U.S. 211 (1872).

85. United States v. Curtis-Wright, 299 U.S. 304 (1936).

86. Secretary of State March, as reported in 5 MOORE, DIGEST OF INTERNATIONAL LAW 167 (1906).

87. See, *e.g.*, COOLEY, CONSTITUTIONAL LAW 103 (2d Ed. 1891); Hughes, *Proceedings,* AM. SOC. OF INT. LAW 194-96 (1929).

88. 2 STOREY, CONSTITUTION 315 (1851).

89. 78 U.S. 616, 620-21 (1870). See also Asakura v. Seattle, 265 U.S. 332 (1923); Geofroy v. Riggs, 133 U.S. 258 (1890).

90. McLaughlin, *Scope of the Treaty Power in the United States,* 42 MINN. L. REV. 709 (1958).

91. 354 U.S. 1, 17 (1956).

comply with the limitations on the treaty power of the United States. Such a decree would not be given supremacy under article VI if it violated any of the provisions of the Constitution. From the above arguments, it would appear that granting the World Court the unrestricted compulsory jurisdiction provided for in the original Morse Resolution, would in no way jeopardize the restraints and guarantees of the Constitution.

V.

LEGAL AND POLITICAL ARGUMENTS FOR THE WITHDRAWAL OF THE CONNALLY RESERVATION.

The Connally Reservation has been severely criticized since its inception.[92] The issues contested have been many.[93] When the reservation was passed in 1946, the question of its legal validity arose. The contention was, since the reservation offended the principles of the statute which gave the Court of International Justice power to decide disputes concerning its own jurisdiction, including questions as to the meaning or effect of the reservation, it might invalidate the Declaration of Adherence by the United States.[94] The consistency of the amendment with the text of the statute was discussed in the Senate. There it was felt, in view of past practice, that there could be little doubt that under article 36(2) of the statute,[95] a State could take exception to the jurisdiction which it recognized.[96] Unfortunately, this question has not yet been decided by the Court.[97]

Another contention has been that an international agreement conditioned by such opportunities for evasion was possibly an obligation without *vinculum juris*. An obligation whose scope is left to the evaluation of the obligee, so that his will constitutes a legally recognized condition of the

92. See, *e.g.*, Briggs, *The United States and the International Court of Justice; A Re-examination*, 53 AM. J. INT'L L. 301 (1959); Preuss, *The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction*, 40 AM. J. INT'L L. 720 (1946).

93. See, *e.g.*, Brownell, *Law in the Settlement of Disputes Between Nations*, 31 CONN. BAR J. 346, 355 (1957); Speech of Vice-President Nixon to the Academy of Political Science, N.Y. Times, Apr. 14, 1959, p. 20, cols. 1-8.

94. See Preuss, *The International Court of Justice*, 32 A.B.A.J. 660, 662 (1946); Waldock, *The Plea of Domestic Jurisdiction Before International Legal Tribunals*, 31 BRIT. YB. INT'L L. 96, 142 (1954).

95. See note 26 *supra*.

96. This was expressly declared by the Fifth Assembly of the League of Nations in 1924, and by the Ninth Assembly in 1928, and while the amendment was not in the spirit of article 36(6) of the statute, it would seem difficult to maintain that it constituted a violation of that provision. See Hudson, *The World Court*, 32 A.B.A.J. 832, 835-36 (1945); Lawson, *The Problem of Compulsory Jurisdiction of the World Court*, 46 AM. J. INT'L L. 219, 237 (1952).

97. See Case of Certain Norwegian Loans, [1957] I.C.J. Rep. 9, 46; Interhandel Case, [1957] I.C.J. Rep. 105. The problem was discussed extensively in both cases by some of the judges. Judges Lauterpacht and Spender took the view that the entire Declaration of Adherence was invalid since the reservation clause was invalid as being incompatible with article 36(6) of the statute and that it could not be severed from the rest of the declaration.

existence of the duty, does not constitute a legal bond.[98] It does not appear that the Court has dealt with this issue.

Although the phrase "within the domestic jurisdiction" was often used before 1945 in arbitration treaties and in the Covenant of the League of Nations,[99] its difficulty of definition as employed in the Morse Resolution[100] coupled with the elusive meaning of "essentially"[101] provides the opponents of the Morse Resolution with an argument for the retention of the Connally Reservation.[102] There is a recognized difference among States in interpretation of what is "essentially domestic."[103] Thus, it is argued, the interpretation of the term by the World Court could differ from that of the United States, depending on whether or not the interpretation of the term by the United States coincided with the view of existing international law.[104] Even though a matter may closely concern the interests of more than one State, it is not of necessity within the realm of international affairs and hence subject to the Court's jurisdiction.[105] For example, international law does not purport to regulate the laws of the States as to nationality[106] and immigration policies.[107] But these are fine lines and fear of such regulation was one of the principal reasons for the adoption of the Connally Reservation.[108] Even assuming that

98. Preuss, *The International Court of Justice*, 32 A.B A.J. 660, 662, (1946).

99. See League of Nations Covenant art. 15, No. 8.

100. See A.B.A. Sect. of Int'l and Comp. L., August (1959). A most competent and comprehensive report of the self-judging aspect of the United States domestic jurisdiction reservation with respect to the International Court of Justice was prepared by a special committee of the American Bar Association.

101. See note 51 *supra*.

102. See note 100 *supra* at 54.

103. *Ibid.*

104. This is so because international law is based upon the common consent of a "majority" of nations extending over a period of time sufficient in duration to cause it to become crystallized into a rule of conduct. See 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 1 (1940). The point is that even though a nation might disagree with the majority of nations, the majority view is imposed upon that nation as being the international law.

105. BRIERLY, THE LAW OF NATIONS, 63, 74-6 (4th ed. 1949).

106. 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, 1-3 (1942). "Nationality is a subject of municipal as distinguished from international law."

107. See 1 OPPENHEIM, INTERNATIONAL LAW 288-92 (7th ed. Lauterpacht 1948).

108. "The United States is the object of envy of many nations of the world and many people. Our Treasury is most attractive to them. Immigration to our shores is something dreamed of. I do not favor and I shall not vote to make it possible for the International Court of Justice to decide whether a question of immigration to our shores is a domestic question or an international question. It is a domestic question, of course; but the Court might contend it is international in character. The Court might say, 'A man leaves one country and migrates to another, and therefore an international question is involved, and suit may be brought against the United States because it discriminates against the citizens of a certain country by not giving them a sufficiently large quota.'

"Mr. President, do we wish to submit to the International Court the question whether we have a right to levy tariffs and duties and to regulate matters of that kind? They are purely domestic questions, and I do not propose to have the International Court have jurisdiction over them.

"Do we want the International Court of Justice to render judgment in a case involving the navigation of the Panama Canal? The Court might say, 'It is an international stream, like the Dardanelles, and the commerce of the

the Court and the United States were presently in accord as to the significance of the term, there is still fear of withdrawing the reservation since the meaning of the term is dependent upon the development of international law and it is impossible to foresee what "essentially within the domestic jurisdiction" might be held to include in the future.[109] The United States, however, has a veto power granted by articles 84 and 27(3) of the United Nations Charter, by which it can resist ultimate enforcement by the Security Council of any decision of the Court.[110] Considering also the fact that under the Morse Resolution the United States reserves the right to withdraw from the jurisdiction of the Court upon six months notice,[111] the United States would appear to have sufficient protection in any matter which it deems "essentially domestic" without the aid of the Connally Reservation.[112]

The fact that there are fifteen judges sitting on the bench of the World Court, fourteen of whom reflect judicial philosophies or systems of law of other States, tends to create a basic fear that domestic matters might be trespassed upon by a predominantly alien court. There is, however, nothing in the record of the World Court which indicates a tendency to encroach upon domestic law.[113]

The value of the protection afforded by the Connally Reservation is significantly counter-balanced by the reciprocity limitation placed upon the jurisdiction of the Court. Any State which has accepted compulsory jurisdiction may still accept such jurisdiction on an *ad hoc* basis when it is a defendant in a suit brought by another State which has conditioned its acceptance of compulsory jurisdiction by a reservation.[114] Since the United States is deeply involved in foreign investments and military bases, no doubt in excess of all other States, it would appear that the United States, by employing the Connally Reservation, is seriously limiting its control and protection over such interests.[115]

The reaction abroad, to date, has been that five nations have incorporated Connally-like reservations into their Declarations of Ad-

world passes through it, and problems relative to it are international problems.' Such problems are not international. In the case of the Panama Canal, our treasure bought it, our blood built it, and it is ours by right of construction. We do (sic) propose to submit to the jurisdiction of any tribunal at any time the right to say whether a question relative to it is a domestic question." 92 CONG. REC. 10695 (1946) (remarks of Senator Connally).

109. See note 104 *supra*.

110. See U. N. CHARTER art. 27, para. 3, § 5. The Security Council requires an affirmative vote of seven before making its decision. Six of the seven must be permanent members of the Charter. Since the United States is a permanent member, no decision can pass without its approval.

111. See Morse, *supra* note 40, at 779.

112. See note 100 *supra* at 61.

113. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE (1920-1942) 476-78 (1943).

114. See Becker, *Some Political Problems of the Legal Adviser, Proceedings,* AM. SOC. OF INT. LAW 266-67 (1958).

115. See note 100 *supra* at 55.

herence.[116] At home, the United States has utilized the reservation in several treaties.[117] It is therefore not contrary to logic to foresee the possibility that more States will avail themselves of the prerogative of employing similar reservations. Though such reservations may not nullify the entire Declaration of Adherence,[118] they serve to cloud not only the powers of the World Court[119] but even worse, the motives and intent of the reserving State.[120]

One more argument must be mentioned. Article 36(2) of the State of the International Court of Justice confines the jurisdiction of the Court to "legal" disputes.[121] This, it is argued, would prevent the Court from taking jurisdiction of political, economic and sociological disputes.[122] It would appear sufficient, however, to point out that these terms are no more susceptible of definition than is "essentially within the domestic jurisdiction."[123]

VI.

CONCLUSION.

It is unfortunate that the paramount reason for the failure of both Hague Conferences and the dubious success of the World Court has not impressed the Senate of the United States. Primarily, this failure was occasioned by the refusal of key nations to accept compulsory jurisdiction by the court proposed in each instance.

Assuming that the prior refusals were justified due to the lack of collateral safeguards, the reason fails to be persuasive insofar as the International Court of Justice is concerned. Under the United Nations Charter the United States can veto any enforcement action taken by the Security Council where it feels jurisdiction has been improperly exercised by the Court. Beyond this, the United States Supreme Court could — and no doubt would — refuse to enforce any adjudication by the World Court where it finds that it concerns the domestic jurisdiction of the United States or infringes upon the Constitution. Article III of the Constitution confers the power to interpret the internal aspects of a treaty on the Supreme Court.

Positively speaking, the removal of the Connally Reservation would eliminate any legal issue concerning the international validity of the original Morse Resolution. Such removal would also tend to provide the United

116. See note 57 *supra.*
117. See Economic Cooperation Act, (1948), sec. 115 (b) 10. 62 Stat. 137.
118. See note 97 *supra.*
119. See cases cited at note 97 *supra.* The World Court has not yet decided the validity of the Connally Reservation.
120. See Preuss, *op. cit. supra* note 98, at 662.
121. See STAT. INT'L CT. JUST. art. 36, para. 2.
122. Briggs, *The United States and the International Court of Justice; A Re-examination,* 53 AM. J. INT'L L. 301 (1959).
123. See note 100 *supra.*

States with greater control over its military bases and other installations on foreign soil. This increased control would follow from the elimination of the defense of other States of lack of reciprocity in any determination of issues sought by the United States before the World Court.

If the hope for the birth of a new "one world" lies in the adoption of the rule of law among nations, it seems vital that the United States participate in the World Court without reservation. From this posture, it becomes patently impossible to equate the nominal safeguards afforded by the Connally Reservation with the actual benefits to be derived from its removal. As the guiding light of the free world, it is imperative that the United States clearly demonstrate its fidelity to the basic conviction that a rule of law among nations is necessary to the survival of our society. It cannot be expected that other nations will find the courage to follow these convictions before we do.

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